IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-090279 C-090280
Plaintiff-Appellant,	:	C-090281 TRIAL NOS. C-09TRC-5888(A-C)
vs.	:	
STEVE BOCKSTIEGEL,	:	*JUDGMENT ENTRY.*
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

In two assignments of error, plaintiff-appellant the state of Ohio appeals the judgment of the trial court dismissing charges against defendant-appellee Steve Bockstiegel for operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood-alcohol level. For the reasons set forth below, we reverse that judgment.

Bockstiegel was involved in an automobile accident on January 20, 2009. At the scene, officers smelled alcohol, and Bockstiegel admitted that he had consumed beer before the accident. Bockstiegel was taken to a hospital where, during his medical treatment, he consented to a blood-alcohol test. His blood was drawn at that time and sent for analysis.

The next day, Bockstiegel was cited for operating a motor vehicle while intoxicated, operating a motor vehicle with a prohibited blood-alcohol level, and failing to maintain an assured clear distance ahead. His initial court appearance was

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[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

set for February 9. At the initial hearing, Bockstiegel filed a motion "to Dismiss DUI and Terminate Administrative License Suspension." The trial court granted the motion as to the two alcohol-related charges. On February 17, before the trial court dismissed the case, the coroner issued an interim report indicating that Bockstiegel's blood-alcohol content was .269g per 100ml.

In one assignment of error, the state argues that the trial court improperly dismissed the two alcohol-related charges against Bockstiegel.[2] Bockstiegel had argued, and the trial court agreed, that the dismissal was proper because Bockstiegel did not have his initial appearance within five days. The statutory provisions regarding an initial appearance state that when a person is charged with a violation of R.C. 4511.19 or an equivalent municipal ordinance, "the person's initial appearance on the charge resulting from the arrest shall be held within five days of the person's arrest or the issuance of the citation to the person."[3]

We have found only one appellate decision addressing this issue.[4] In that case, the Tenth Appellate District determined that a dismissal for failing to hold an initial appearance within five days was improper.[5] The court concluded that "the trial court essentially treated the five-day requirement for holding the initial appearance as a speedy trial right requiring dismissal of the criminal charges, a

[2] The state has also appealed Case No. C09TRC-5888(C), in the appeal numbered C-090281. This involves the assured-clear-distance charge to which Bockstiegel pleaded no contest. Since the trial court did not dismiss that charge, and the state has made no argument relating to it, Appeal No. C-090281 is dismissed.
[3] R.C. 4511.191(D)(2); R.C. 4511.196(A).
[4] *Columbus v. Rose*, 10th Dist. No. 06AP-579, 2007-Ohio-499.
[5] Id.

result supported by neither the speedy trial statutes (R.C. 2945.71 through 2945.73) nor R.C. 4511.191 and 4511.196."[6]

We agree that the five-day period set forth in R.C. 4511.191 and 4511.196 is not a speedy-trial provision. Under the speedy-trial statutes, the legislature specified the remedy for the failure to meet a trial deadline: dismissal with or without prejudice depending on the context.[7] Neither R.C. 4511.191 nor R.C. 4511.196 sets forth any remedy for the failure to hold an initial appearance within the five-day period. And the failure to meet this deadline is not addressed within the context of the speedy-trial statutes.[8]

Bockstiegel argues that the use of the term "shall" indicates a legislative intent to make the five-day period mandatory. But even with "shall" as the operative verb, a statutory time provision may be directory.[9] "As a general rule, a statute which provides a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure."[10] As this court has noted, "[g]enerally, then, it is only where a statutory time requirement evinces an object or purpose to limit a court's authority that the requirement will be considered jurisdictional."[11]

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[6] Id. at ¶7.
[7] See R.C. 2945.73.
[8] Id.
[9] *In re Davis*, 84 Ohio St.3d 520, 522, 1999-Ohio-419, 705 N.E.2d 1219.
[10] Id., quoting *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467, 472, 66 N.E.2d 531.
[11] *State v. Shelton,* 1st Dist. Nos. C-060789 and C-060790, 2007-Ohio-5460, at ¶17, quoting *Farrar,* paragraph three of the syllabus.

In this case, the use of the word "shall" made the time provision directory, not mandatory. The statutes here do not include any expression of intent to restrict the jurisdiction of the court for untimeliness.[12] As the Ohio Supreme Court has held, the absence of dismissal as the stated remedy for failure to meet the deadline establishes that the time period is directory.[13]

While Bockstiegel had other remedies for the failure of the trial court to hold an initial hearing within five days, dismissal of the charges was not among them. As the Ohio Supreme Court noted in *In re Davis*, "[a]lthough we hold that the seven-day time limit is directory rather than mandatory, such a finding does not render the provision meaningless. * * * [T]he time constraint in the statute serves as justification for seeking a writ of procedendo."[14]

Since the five-day time provision was directory, not jurisdictional, the trial court erred when it dismissed the alcohol-related charges against Bockstiegel. The state's first assignment of error is sustained.

In a second assignment of error, the state claims that it was improper for the trial court to set aside Bockstiegel's administrative driver's license suspension. But the record does not reflect that his license was administratively suspended, nor does it establish that the trial court set it aside. For these reasons, we overrule the second assignment of error.

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[12] *In re Davis*, supra.
[13] Id.; see, also, *State v. Bellman*, 86 Ohio St.3d 208, 210, 1999-Ohio-95, 714 N.E.2d 381 (time period in former sexual-offender registration statute was directory when it "d[id] not include any expression of intent to restrict the jurisdiction of the court for untimeliness").
[14] Id.

We reverse the trial court's judgment in the appeals numbered C-090279 and C-090280 and remand those cases for further proceedings consistent with this entry. The appeal numbered C-090281 is dismissed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER and **MALLORY, JJ.**

To the Clerk:

Enter upon the Journal of the Court on March 31, 2010

per order of the Court _____.

Presiding Judge